

**IN THE
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

No. 15-4154

WILLIAM A. IZZARD,

Appellant,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

APPELLANT'S REPLY BRIEF

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I. OVERVIEW

William A. Izzard (Appellant or Mr. Izzard) claims entitlement to a compensable rating of 30% for service-connected PTSD with alcohol dependence from April 23, 2008, though June 13, 2012.

The parties disagree on whether the Board provided adequate reasons or bases in deciding to elevate a September 2008 VA examination report over first-hand experiences and observations by Mr. Izzard and his wife, a March 2009 examiner's note, and an April 2009 VA treatment record. Appellee's Brief (AB) at 8-9. The AB errs by failing to demonstrate how the Board provided adequate reasons or bases in reconciling evidence favorable to a 30% rating—lay evidence from Mr. Izzard and his wife, a March 2009 examiner's note, and an April 2009 VA treatment record—with the lone September 2008 VA examination report, which purportedly provides evidence to the contrary. Accordingly, Appellant respectfully requests that the court grant the relief requested in his opening brief.

II. SECRETARY'S ARGUMENTS AND APPELLANT'S RESPONSE

A. Relief Requested

Appellant's opening brief did not request reversal based on clear error. Instead, his prayer for relief requested remand for readjudication in accordance with *Tucker v. West*, 11 Vet.App. 369, 374 (1998), which includes relief from a failure to adequately provide sufficient reasons or bases for a decision. Appellant's

Opening Brief (AOB) at 12. Yet, the AB emphasizes that the standard of review is clear error—i.e., the correct standard for reviewing a finding of fact, including the degree of disability. *See, e.g.*, AB at 8. But even then, the Board’s finding must be supported by adequate reasons or bases, and a failure to provide as much is itself an error that requires remand. *Mitchem v. Brown*, 9 Vet. App. 138, 140 (1996). Here, the Board failed to provide adequate reasons or bases in deciding to elevate the September 2008 VA examination report over first-hand experiences and observations by Mr. Izzard and his wife, the March 2009 examiner’s note, and the April 2009 VA treatment record, all of which support a 30% rating.

B. The Evidence Shows Mr. Izzard’s Symptoms More Closely Approximate a 30% Rating

When deciding entitlement to a given disability rating, a veteran’s symptomatology is the primary consideration. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117-18 (Fed. Cir. 2013). However, the Board need not find the presence of all, most, or even some of the enumerated symptoms in order to assign a corresponding rating. *Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2002). Ultimately, “[t]he BVA is required to address thoroughly, analyze carefully, and *reconcile all* relevant evidence in the record.” *Cousino v. Derwinski*, 1 Vet. App. 536, 540 (1991) (emphasis in original).

The criteria for PTSD disability ratings of 10% and 30% are recited in the AOB (AOB at 3-4) and the AB (AB at 7). *See also* 38 C.F.R. § 4.130 (2015). For brevity, they will not be recited again.

Although both ratings require occupational and social impairment, to highlight the distinctions between the two, the 10% rating contemplates symptoms being so *mild or transient* that reduced work efficiency and occupational performance only occurs during times of significant stress. 38 C.F.R. § 4.130; *Vazquez-Claudio*, 713 F.3d at 116. Contrastingly, the 30% rating additionally considers whether a veteran occasionally experiences reduced work efficiency and occupational performance resulting from symptoms such as depression, anxiety, suspiciousness, panic attacks, and chronic sleep impairment. 38 C.F.R. § 4.130. The 30% rating also accounts for the fact that a veteran may exhibit the enumerated symptoms, and nevertheless function generally satisfactorily, with routine behavior, self-care, and normal conversation. *Id.* In other words, a veteran may suffer from the enumerated symptoms, otherwise maintain generally ordinary, healthy behavior, and still be suitably assigned a 30% rating. That is the case here.

Lay evidence from Mr. Izzard and his wife shows that he experienced symptoms consistent with a 30% rating, including having “anxious butterflies;” being easily startled and irritated; experiencing nightmares and depression; feeling depressed and anti-social; being very emotional; obsessing over war; and being

ineffectively nervous in job interviews. R. 431 (426-34), 517, 519 (515-21); *see* 38 C.F.R. § 4.130 (explicitly reciting that symptoms such as “depressed mood, anxiety, suspiciousness, panic attacks . . . and chronic sleep impairment” are consistent with a 30% rating). Both the Board and the AB acknowledged this evidence, *see* R. 12-13 (2-18); AB at 2, 9-10, but rely on a 2008 VA examination report to show that, despite his symptoms, Mr. Izzard was otherwise generally well-adjusted, suffered only mild or transient symptoms, and therefore should not be awarded a rating in excess of 10%. *See* R. 12-13 (2-18) (noting Mr. Izzard maintained good relationships with his family and friends, held a steady job, and was well-dressed and groomed). However, as discussed, *supra*, a 30% rating contemplates that the enumerated symptomatology may run concurrently with otherwise ordinary, healthy behavior. *See* 38 C.F.R. § 4.130 (noting a veteran may suffer occupational and social impairment “although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal”). Thus, even evidence cited as apparently negative by the Board and AB is not inconsistent with a 30% rating.

Nevertheless, in finding the September 2008 VA examination report to be more probative than the above-mentioned lay evidence, the Board noted only that Mr. Izzard and his wife were not competent to identify specific levels of disability, and that the medical personnel who prepared the September 2008 VA examination

report were, in fact, competent in this regard. *See* R. 14 (2-18). Thereafter, the Board deferred to the September 2008 VA examination report. *Id.* Stated another way, the Board found that because Mr. Izzard and his wife were not competent to assign a level of disability, and because medical personnel were, the medical report was more probative. *Id.* This is insufficient to satisfy the reasons or bases requirement, and further demonstrates at least two flaws in the Board's analysis, which the AB does not, and cannot explain away.

First, the Board improperly relied solely on the examiner's assessment of the level of disability at the moment of examination. 38 C.F.R. § 4.126 provides that "[t]he rating agency shall assign an evaluation based on all the evidence of record that bears on occupational and social impairment rather than solely on the examiner's assessment of the level of disability at the moment of the examination." Here, the Board's decision to discount the competent lay evidence provided by Mr. Izzard and his wife evidences an undue reliance on the examiner's assessment provided in the September 2008 VA examination report. Furthermore, as discussed, *infra*, the Board's decision also fails to reconcile other medical evidence consistent with a 30% rating.

Second, the Board failed to reconcile how, despite being categorized as less probative than the September 2008 VA examination report, the lay evidence was inadequate for a 30% rating. *See King v. Shinseki*, 700 F.3d 1339, 1344 (Fed. Cir.

2012) (providing that “lay evidence is one type of evidence that must be considered” and “competent lay evidence can be sufficient in and of itself”). Indeed, lay evidence provided by Mr. Izzard and his wife showed that Mr. Izzard suffered from symptoms consistent with a 30% rating, including that, for example, his ineffectiveness and nervousness during interviews reduced his work efficiency and occupational performance. *Cousino*, 1 Vet. App. at 540 (citing employability as a factor to consider when determining disability ratings for PTSD). The Board’s statement that “[t]he levels of functional impairment described by the Veteran are consistent with (and do not exceed) the criteria for a 10 percent rating prior to June 14, 2012,” R. 14 (2-18), is conclusory and therefore inadequate to fulfill its reasons or bases obligations. *See Mitchem*, 9 Vet. App. at 140 (“A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor ‘clear enough to permit effective judicial review’, nor in compliance with statutory requirements.”).

Furthermore, regarding the March 2009 examiner’s note, which showed that Mr. Izzard exhibited more than “mild or transient symptoms,” the AB contends that “moderate social and familial impairment” is not, by itself, sufficient to award an increased rating of 30%. But Mr. Izzard never asserted as much. Rather, Mr. Izzard argued in the AOB that “moderate” symptoms are greater than “mild or transient symptoms,” and noted that the Board failed to explain why it rejected this

and other medical evidence favoring an increased rating. AOB at 8. Particularly when, as here, “[t]he need for an adequate statement of reasons or bases is particularly acute when BVA findings and conclusions pertain to the degree of disability resulting from mental disorder such as PTSD.” *Mitchem*, 9 Vet. App. at 140. The AB does not, and cannot, refute the Board’s failure in this regard.

Finally, regarding the April 2009 VA treatment record, which indicated Mr. Izzard having suicidal thoughts, R. 374 (373-83), the AB contends that Mr. Izzard directly linked his suicidal ideation to his financial circumstance and was thus not a symptom of his PTSD. AB at 11. That is incorrect. The report notes that Mr. Izzard had suicidal thoughts “as a relief from stress,” and that because life insurance would presumably payout a claim upon his death, suicide would improve his family’s financial situation. R. 374 (373-83). Thus, improving his family’s finances was considered an ancillary consequence to suicide, not the sole reason for it, as the AB contends.

However, even if Mr. Izzard’s suicidal ideations did not result from his PTSD, which he does not concede, it would be of no consequence because other evidence—i.e., lay evidence from Mr. Izzard and his wife and the March 2009 examiner’s note—demonstrates symptomatology consistent with a 30% rating. *See Mauerhan*, 16 Vet. App. at 442 (noting the Board need not find the presence of all, most, or even some of the enumerated symptoms in order to assign a

corresponding rating). And, again, as with the March 2009 examiner's note, the Board failed to reconcile why the April 2009 VA treatment record did not evidence a 30% rating, and the AB does not, and cannot, refute the Board's failure in this regard.

C. The Board Failed to Assign the Higher Evaluation of 30%

At minimum, the Board failed to consider the provisions of 38 C.F.R. § 4.7, which requires application of a higher rating when there is a close question between the two. *See Pierce v. Principi*, 18 Vet. App. 440, 445 (2004) (holding that a failure to apply regulations including 38 C.F.R. § 4.7 in an increased rating case may constitute error). Here, when the evidence, including competent, credible lay evidence along with the above-mentioned, favorable medical evidence, is viewed in its entirety, it is clear that during the critical period, Mr. Izzard exhibited far more than "mild or transient" symptoms that correspond with a 10% rating. The Board's statement that "[t]he medical evidence during this period does not reflect [impairment and symptoms consistent with a 30% rating]," R. 13 (2-18), is conclusory and therefore inadequate to fulfill its reasons or bases obligations. *See Mitchem*, 9 Vet. App. at 140 ("A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor 'clear enough

to permit effective judicial review’, nor in compliance with statutory requirements.”). The AB cannot refute the Board’s failure in this regard.

III. CONCLUSION

Appellant respectfully requests that the court grant the relief requested in his opening brief.

Respectfully submitted,

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